IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG

Case No: 6477/18P

In the matter between:

KATJA OFFERMAN	**FIRST APPLICANT**
ALBERDINA GELDENHUYS N.O.	**SECOND APPLICANT**
and	
PATRICIA ANNE SWANEPOEL	**FIRST RESPONDENT**
MASTER OF THE HIGH COURT, GRAHAMSTOWN	**SECOND RESPONDENT**

Date of set down: 13, 14 September 2021; 18 January 2022
Date delivered: 10 February 2022

ORDER

The following order is granted:

1. It is declared that the sale agreement concluded between the applicants and the first respondent on 2 September 2015 did not fail by virtue of the non-fulfilment of the suspensive condition within the period prescribed by the sale agreement;
2. The applicants are to pay the first respondent's costs jointly and severally, the one paying, the other to be absolved.

JUDGMENT

MOSSOP AJ:

[1] The first applicant is a qualified attorney who presently serves as a magistrate in Makhanda, Eastern Cape. Prior to settling there, she and her husband, Mr Pierre Offerman (Pierre), at one stage lived in the small village of Winterton, in the foothills of the Drakensberg in KwaZulu-Natal. There, the first applicant and Pierre met the first respondent and her husband. Their children went to school together and eventually the two couples developed a strong friendship that included, inter alia, enjoying holidays together. The first applicant and Pierre owned a plot of land of approximately 21 hectares in extent with certain improvements thereon in the environs of the village of Winterton (the property). The bliss of this bucolic friendship experienced a setback, however, when the first applicant and Pierre left Winterton sometime during 2000. Nonetheless, the first applicant and first respondent maintained their friendship despite no longer living in the same town. The first applicant and Pierre, however, did not maintain their relationship and they divorced in 2008 and on 13 November 2011 Pierre, unfortunately, passed away. The second applicant was appointed as the executor of his estate.

[2] The first applicant and Pierre were married in community of property and consequently owned the property in equal shares. Constructed on the property were several dwellings, comprising three cottages, two flats and a hostel. At the time of Pierre's death, the first applicant was still a half owner of the property and the friendship between the first applicant and the first respondent was still intact. Acting on her own behalf and on behalf of the second applicant, the first applicant proposed to the first respondent that she purchase the property from Pierre's estate and herself. This was not something that the first respondent had ever contemplated, but after some consideration, she ultimately agreed to do so, and the purchase price was fixed at the sum of R1 million. A written agreement of sale was accordingly prepared and signed by the first and second applicants on 4 August 2015 and by the first respondent on 2 September 2015 (the sale agreement).

[3] The sale agreement contained a suspensive condition (the suspensive condition) that required the first respondent to obtain a loan from a financial institution within 30 days of the date determined in clause 3.4 of the sale agreement (the 30-day period). As will appear more fully hereafter, the applicants were of the view that the 30-day period terminated on 30 November 2015. It appears that the first respondent, at least initially, also believed this to be the case.

[4] After signature of the sale agreement and prior to 30 November 2015, the first applicant enquired from the first respondent whether she would be prepared to advance to her R100 000 of the R1 million purchase price before transfer occurred as a 'deposit'. The sale agreement made no provision for a deposit to be paid. The reason for this request was that the first applicant was under pressure to pay a firm of attorneys for legal work done on her behalf and she lacked the means to make that payment. On 27 October 2015, the first applicant sent an email reminder to the first respondent in which she stated:

'… and I just want to know if you are still able to pay me a deposit of R100 000.00 so I can get them off my back they sound very threatening [sic].'

No immediate response was received from the first respondent to this email.

[5] On 4 December 2015, the first applicant sent an email to the nominated conveyancers entrusted with the transfer of the property and suggested that the sale agreement had failed because the suspensive condition had not been fulfilled as the first respondent had not acquired the loan that she required by 30 November 2015. She sought confirmation from the attorneys that her understanding of the position was correct. A week later, on 11 December 2015, the attorneys responded to her in an email. They did not address the first applicant's query in her email of 4 December 2015. Instead, they informed her that the first respondent was prepared to advance the requested amount of R100 000 to the first applicant, provided that the first applicant agreed to extend the period within which the first respondent had to acquire the loan to the end of January 2016. Three days later, on 14 December 2015, the first applicant responded as follows:

'What a relief thank you so much.

My banking details are:

(Banking details provided)
Have a very merry Christmas Season and lets trust that it will all be smooth sailing in the new year.'
The R100 000 was paid to the first applicant the next day, 15 December 2015.

[6] On an unspecified date in December 2015, the first respondent secured her loan. Notwithstanding this, and the payment of the 'deposit' of R100 000 to the first applicant, transfer of the property did not occur. The applicants appear to have taken the view, after signing the sale agreement, that the property was worth more than the R1 million agreed to and that, in particular, the first applicant had been misled by the first respondent as to its true value. The first applicant ascribed this to her 'naïve reliance upon the First Respondent's representation of the value of the property'. The applicants also contended that the sale agreement had lapsed because the first respondent had not acquired her loan by 30 November 2015, and they therefore declined to allow the transfer to occur.

[7] The consequence of the impasse was the bringing of this application. In this application, the applicants seek the following relief:
'1. First Respondent is hereby ordered to vacate the property described as Lot 5A, Winterton Settlement, Farm no. 11774, Winterton, KwaZulu-Natal and to restore possession thereof to the Applicant [sic] by no later than 10 days from date of service of this order;
2. That the Sheriff of the High Court for the district of Winterton carry out the eviction forthwith after the expiry of the period set out in paragraph 1 hereinabove, in the event of the first respondent not vacating the property in terms of paragraph 1 hereof;
3. That the First Respondent be ordered to pay the Applicants' costs of the application on an attorney and client scale in the event that she opposes the application.'

[8] The first respondent opposes that claim and has, in turn, brought a counter-application in which she seeks the following relief:
'1. That it is declared that the suspensive condition, contained in clause 19 of the deed of sale concluded between the Applicants and the First Respondent at Ladysmith on 2 September 2015 ("the deed of sale") has been validly waived by the parties.
2. That First and Second Applicants are ordered to sign all documents necessary and to perform all actions necessary to affect registration of transfer of the property known as Lot A

5 A Winterton Settlement Farm No. 11774, in extent 21,1246 hectares, held by Title Deed No. T11254/1991 (“the property”) into First Respondent’s name.

3. That the Sheriff of this Court is hereby authorised and directed to sign all documents necessary and to perform all actions necessary to effect registration of transfer of the property into the First Respondent’s name, in the event of the First and /or Second Applicants failing to comply with the provisions of paragraph 2 of this order, within 10 days of the granting of this order.

4. That the second respondent is authorised and directed to sign and provide to the conveyancers, Messrs McCauley and Riddell of Ladysmith, a certificate as intended in section 42(2) of the Administration of Estates Act 66 of 1965, within ten (10) days of service of this order on Second Respondent.

5. That the First and Second Applicants are ordered to pay the costs of the counter application, jointly and severally, the one paying the other to be absolved.’

[9] In the alternative, the first respondent seeks judgment against the applicants for payments of the amounts of R893 528.30 and R100 000 respectively.

[10] The application and counter-application were ultimately on 8 February 2019 referred by Hadebe J to the hearing of oral evidence on 13 and 14 September 2021 on a raft of defined issues. Those issues were subsequently reduced and refined to a single issue. In terms of the provisions of Uniform rule 33(4) I was ultimately requested by all parties to determine whether the sale agreement is of no force and effect by virtue of the suspensive condition contained therein not being fulfilled within the period prescribed by the sale agreement. I consider it convenient to decide this issue separately as its determination may put an end to the litigation between the parties.

[11] When I was assigned the matter on 13 September 2021, that assignment was done on very short notice, such that I had no opportunity to read the papers before the matter commenced. I was not aware of the issues and had to be guided through the papers by the parties. The parties both elected not to lead any oral evidence but were content merely to argue the matter further on the papers. Having heard that argument, but still not having read the papers, I indicated that I would read the papers overnight and would seek clarity from the parties in respect of any issues of which I was unsure

of the next day, the matter having been set down for two days. I read the papers overnight and the next day I raised two issues with the parties, namely:

(a) the immovable property described in the notice of motion did not conform with the description of the immoveable property identified in the sale agreement; and

(b) by when did the suspensive condition have to be fulfilled?

[12] As a consequence, both parties ultimately requested leave to deliver supplementary affidavits dealing with these two issues, which request was granted, and the matter was adjourned to 18 and 19 January 2022 for this to occur and for further argument.

[13] The issue concerning the description of the property is easily resolved. The notice of motion describes the property as being 'Lot 5A Winterton Settlement Farm no 11774' whereas the sale agreement refers to the property as being 'Lot A 5 A Winterton Settlement Farm nr 11774.' In their supplementary affidavit, the applicants indicate that the description contained in the sale agreement is the correct description of the property. They sought an amendment of the notice of motion, which was not opposed and is granted. The resolution of the other issue identified by me is not as simply resolved.

[14] The second issue identified by me falls within the issue that I am required to determine, namely whether the sale agreement failed by virtue of a suspensive condition contained therein not being fulfilled within the period prescribed by the sale agreement. The applicants' case can fairly be summarised as follows: the first respondent was given sole beneficial occupation of the property on 31 October 2015. The suspensive condition had to be fulfilled within the 30-day period which began running from that date. That meant that the loan had to be acquired by the first respondent by 30 November 2015. The loan was not acquired by that date and so the sale agreement accordingly failed automatically. That is the version against which the issue before me must be determined. The first respondent asserts, inter alia, that the sale agreement did not fail by virtue of the non-fulfilment of the suspensive condition

[15] The effect of a suspensive condition in a sale agreement is that it postpones 'the operation of the [sale agreement] until the happening of some uncertain future event'.[1] The Supreme Court of Appeal stated in *Hanuscke Beleggings CC v Kungwini Local Municipality* that:[2]

'An agreement of purchase and sale subject to a suspensive condition is not a sale pending fulfilment of the condition "but there is nevertheless created "a very real and definite contractual relationship" which, on fulfilment of the condition, develops into the relationship of seller and purchaser . . .".' (Footnote omitted.)

[16] As regards the position when a suspensive condition is not timeously fulfilled, in *Design and Planning Service v Kruger* Botha JA said:[3]

'In my view, when a suspensive condition, of a kind which has not been inserted in the contract for the specific benefit of one of the parties only, remains unfulfilled after the lapse of a reasonable time for fulfilment, the contract is discharged automatically, by virtue of an implied term to that effect, unless there is something in the contract negativing the implication of such a term, and subject to the possibility of fictional fulfilment of the condition by reason of the conduct or inaction of either of the parties. Ordinarily, no action on the part of either of the parties equivalent to a placing *in mora* of the other in relation to the fulfilment of the condition as such is required before the contract comes to an end.'

[17] In *Commissioner, South African Revenue Service v Bosch and another,*[4] this approach was approved by the Supreme Court of Appeal where the following was stated by Wallis JA:

'. . . the effect of non-fulfilment of a suspensive condition is that the contract comes to an end automatically. That follows necessarily from the fact that no action lies to compel the performance of a suspensive condition. If there is no right to compel performance there can be no question of a breach warranting cancellation of the contract.' (Footnote omitted.)

[18] As regards the onus, it has been held that:

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[1] *Tamarillo (Pty) Ltd v BN Aitken (Pty)* Ltd 1982 (1) SA 398 (A) at 432C.
[2] *Hanuscke Beleggings CC v Kungwini Local Municipality* [2012] ZASCA 112 para 11.
[3] *Design and Planning Service v Kruger* 1974 (1) SA 689 (T) at 697G-H.
[4] *Commissioner, South African Revenue Service v Bosch and another* [2014] ZASCA 171; 2015 (2) SA 174 (SCA) para 31.

'In our law the fulfilment of a true suspensive condition must be pleaded and proved by the person who is relying on the contract, but the breach of a term in the contract must be pleaded and proved by the person who relies on such a breach as a ground for repudiating liability under the contract.'[5]

[19] The Supreme Court of Appeal, in *Dormell Properties 282 CC v Renasa Insurance* Co *Ltd* and *others NNO,*[6] stated that:

'The terms of the contract are the decisive criterion by which any potential expiry of a deadline has to be determined'.

[20] It is therefore to the sale agreement that I now turn. The suspensive condition is contained in clause 19 of the sale agreement, and reads:

'It is a condition of this sale agreement, which condition is created for the benefit of both SELLER and the PURCHASER, that the PURCHASER is able to obtain a loan at current bank rates and conditions normally applicable to housing loans, for the sum of not less than R1 000 000.00 within 30 (THIRTY) days from the date determined in clause 3.4 above. The parties acknowledge that the PURCHASER cannot acquire the property which is hereby sold if the aforementioned loan is not obtained. The parties furthermore agree that the granting of a loan in principle, pending the availability of funds, shall be regarded as compliance with this condition. The aforementioned period may, however, prior to expiry thereof, in the discretion of the SELLER, be extended provided that such extension shall be in writing and signed by all parties. Should the aforementioned condition not be fulfilled, this sale agreement shall be of no force and effect.'

[21] Clause 3.4, referred to in clause 19, reads as follows:

'The PROPERTY is presently occupied by unlawful occupants whom the SELLER authorises the PURCHASER to have evicted at her instance and cost, it being recorded that sole beneficial occupation shall only be enjoyed by the PURCHASER once the said occupants have vacated or been evicted from the PROPERTY, this being the date from which occupational interest shall be calculated.'

[22] From the wording of clauses 19 and 3.4 of the sale agreement it is evident that

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[5] *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1963 (1) SA 632 (A) at 644G-H.
[6] *Dormell Properties 282 CC v Renasa Insurance Co Ltd and others NNO* [2010] ZASCA 137; 2011 (1) SA 70 (SCA) para 26.

there is no fixed date from which it can be determined that the 30-day period commenced running. The issue before me could thus simply be dealt with on the basis that it is not possible to determine by when the suspensive condition commenced running and by what date it had to be fulfilled, and to therefore hold that the suspensive condition never became operative and, consequently, that the sale agreement did not fail. However, that would lead to an 'insensible or unbusinesslike' interpretation of the sale agreement and would undermine its apparent purpose.[7]

[23] As was said in *Versveld v SA Railways and Harbours*,[8] '[i]n every computation of time there must be an instant from which time [commences to] run'. Usually, a contract will provide that something shall be done within a certain number of days from the date of its conclusion. But this may not necessarily be calculated from a date: it may be calculated from the happening of an event.[9] In this matter it appears that the parties agreed on the latter approach, namely that an event would determine the commencement date of the running of the 30-day period. Clause 3.4 defines that event, being the removal of the acknowledged unlawful occupants from the property.

[24] The only sensible meaning to be given to clauses 19 and 3.4 is that upon the removal of the last unlawful occupant, the first respondent would be regarded as having achieved 'sole beneficial occupation' of the property. When that was achieved, the 30-day period would commence to run. In terms of clause 3.3 of the sale agreement, the first respondent's obligation to commence paying occupational interest would also commence on the achievement of sole beneficial occupation by the first respondent. It is therefore necessary to determine what 'sole beneficial occupation' means and when, if it all, it was achieved.

[25] 'Beneficial occupation' is a term widely used both in common law and in various contracts and statutes. In the context of lease agreements, it is used to mean the free

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[7] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.
[8] *Versveld v South African Railways and Harbours* 1937 CPD 55 at 58.
[9] Lee and Honoré *The South African Law of Obligations* 2 ed (1978) at 49.

and undisturbed use (*commodus usus*) of the leased asset by the lessee.[10] In *Ex parte Van Deventer,*[11] the court defined beneficial occupation to mean

'. . . occupation which would produce a benefit'.

'Sole' when used as an adjective, means 'being the only one' or 'not shared with anyone else'.[12] In the context of the sale agreement, which provided for the first respondent to be afforded occupation on signature of the sale agreement, 'sole beneficial occupation' must therefore mean that the first respondent, to the exclusion of all others, was to enjoy the benefit of occupation of the property pending transfer.

[26] The applicants allege that

'. . . the first respondent was given sole beneficial occupation of the property by no later than 31 October 2021'.

However, the applicants go on to state immediately thereafter that

'By this date [31 October 2015] no occupants remained on the property other than David and Gillian Atkinson'.

[27] It appears to me that these two statements are contradictory given the meaning of 'sole beneficial occupation' discussed above. Mr David Atkinson and Mrs Gillian Atkinson (the Atkinsons) occupied a portion of the property and had beneficial occupation of that portion that they occupied. It follows that the first respondent could not have had sole beneficial occupation of the entire property. In addition, the Atkinsons must have been unlawful occupants prior to 31 October 2015. That this must be so is evidenced by the fact that the applicants allege that they only concluded a lease agreement with the Atkinsons on that date (the first lease agreement). This would not have been necessary had the Atkinsons already occupied a portion of the property in terms of a valid, existing lease. As evidence of the conclusion of the first lease agreement, the applicants put up a copy of that document. It is, however, inchoate. It bears only the signature of Mr Atkinson, who signs as 'lessor' (which he was not). Having signed in that capacity, he could not also sign in the space allowed on the document for the lessee to sign. The first lease agreement was not signed by

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[10] *Sishen Hotel (Edms) Bpk v Suid-Afrikaanse Yster En Staal Industriële Korporasie Bpk* 1987 (2) SA 932 (A).

[11] *Ex parte Van Deventer* 1950 (2) SA 90 (N) at 92.

[12] The Cambridge Online Dictionary: https://dictionary.cambridge.org/dictionary/english/sole.

the applicants or their duly authorised representative. No evidence of a properly executed lease agreement in place on 31 October 2015 has therefore been put up.

[28] The first respondent denies that the first lease agreement was concluded on 31 October 2015. She does, however, agree that a lease agreement was concluded between the Atkinsons and the applicants but states that this occurred only in November 2015. She puts up a signed lease agreement in support of her allegation (the second lease agreement). This lease agreement is signed by both parties to the agreement. It has a failing though: Mr Atkinson did not date his signature. The attorney who drew the second lease agreement, Mr James Howieson Marshall, confirmed under oath that he drew it and that it was signed by the applicants' representative, who happens to be the first respondent's husband, on 10 November 2015. It is thus not possible to determine precisely when the second lease agreement was executed by both parties. Mr Atkinson may have signed before 10 November 2015, but he may also have signed after that date.

[29] Mr Atkinson deposed to a confirmatory affidavit and persisted in his version that he concluded a written lease agreement with the applicants on 31 October 2015. He made no mention whatsoever of the fact that he signed the second lease agreement, and he accordingly did not use the opportunity to disclose when he did so sign that agreement. I have no hesitation in rejecting his submission that the first lease agreement was the operative agreement and that it operated from 31 October 2015. If that was the case, there would have been no need for him to sign the second lease agreement, on which occasion he signed in the correct place as 'lessee'. At no stage does he assert that the first lease agreement was an oral lease – on his version it was written. Mr Atkinson goes on to state that he concluded several other lease agreements with the first respondent after concluding the first lease agreement (which was concluded with the applicants, as was the second lease agreement) and provides copies of such other lease agreements. He does not, however, account for the conclusion of the second lease agreement nor does he give an explanation as to why he signed it if he had already signed the first lease agreement.

[30] The applicants submit that I need not consider whether the dates they have pleaded are correct or not because the first respondent has admitted them and they are thus not in dispute. They correctly state, via the first applicant, that

'There is no dispute regarding the fact that the first respondent ought to have obtained the necessary loan in order to satisfy the suspensive condition contained in clause 19 of the agreement on 30 November 2015 failing which the agreement would lapse.'

While the first respondent initially admitted both the date by which she was given sole beneficial occupation and the date by which she had to secure the loan, this is no longer the case. I shall deal with why this is no longer the first respondent's position shortly. Despite this invitation to assume the correctness of the dates alleged by the applicant and admitted by the first respondent, it is an invitation that I must decline. I am of the view that I must assess whether the applicants' contention as to the date upon which the first respondent was allegedly given sole beneficial occupation and the date by which the loan was to be obtained is supported by the provisions of the sale agreement.

[31] The first respondent made the admissions contended for by the applicants. As regards the date of sole beneficial occupation, she stated as follows:

'Vacant possession and occupation of the property was eventually given to me at the end of October 2015.'

Concerning the date by when the loan had to be acquired by her, she stated as follows:

'I do not dispute that in terms of the agreement of sale, the necessary loan in order to satisfy the suspensive condition contained in clause 19 of the agreement had to be approved on or before 30 November 2015.'

[32] The applicants have relied on these admissions and submitted that they resolve the issue before me in their favour. The first respondent in her supplementary answering affidavit states the following in connection with the date of 30 November 2015:

'. . . when the First Applicant notified my husband telephonically on the evening of 30 November 2015 that the period I was afforded to obtain a loan would have expired that very day, my husband and I had no reason to query her as a dear friend and also a legal professional. At that stage this date was the date the First Applicant had come up with and I even accepted in good faith in my original Answering Affidavit, as drawn up by my erstwhile

attorneys and unchecked by them, that the date of 30 November 2015 was in fact the date to use to establish whether the Deed of Sale lapsed or not.

27. It was only when Justice [sic] Mossop at the last hearing in this matter mero motu pointed it out that the date as mentioned in clause 3.4 was never identified, when I realised that the date of 30 November 2015 could never have been the date to work with. My reference in the Answering Affidavit that this date was correct, was therefore incorrect and was merely made as the date I believed was the correct date as constantly referred to by the First Applicant and never properly checked as being correct by neither my erstwhile attorneys nor myself. It simply did not cross my mind to have ever questioned the first applicant.'

[33] Given the friendship between the first applicant and the first respondent, and the fact that the first respondent was a qualified attorney, I am inclined to accept that the first respondent may have simply accepted the correctness of what the first applicant stated and that her admissions were made without careful consideration and without reference to what the sale agreement actually provided.

[34] The allegations as to when sole beneficial occupation was achieved is of cardinal importance as the running of the 30-day period is inextricably linked to it. The sale agreement distinguished between possession, occupation and sole beneficial occupation. Possession and occupation occurred immediately upon signature of the sale agreement (the last signing party signed on 2 September 2015). It is not disputed that when the first respondent was given possession and occupation there were more unlawful occupiers than merely the Atkinsons on the property. Thus possession and occupation could not mean sole beneficial occupation. It is entirely possible for a party to be given occupation but not beneficial occupation.[13] Sole beneficial occupation could only have been achieved later, after possession and occupation had been given to the first respondent.

[35] Where a party alleges in a pleading that a contract has a particular legal meaning or consequence, whereas that may not be the case, an admission by the other party that the party making the allegation is correct does not make it so. What the law is has always been a matter for the court to determine, and it is well established

[13] *Arnold v Viljoen* 1954 (3) SA 322 (C).

that mistakes about the law which the parties make are not binding on a court. In *Paddock Motors (Pty) Ltd v Igesund*[14] the court observed that it would be:

'. . . an intolerable position if a Court were to be precluded from giving the right decision on accepted facts, merely because a party failed to raise a legal point, as a result of an error of law on his part.'

[36] If the allegations made by the applicants are not supported by the sale agreement or the facts, then any admissions made by the first respondent to those allegations are meaningless. The court cannot rubberstamp an allegation and an admission thereof simply because it was made and admitted, if that is not in accordance with the provisions of the sale agreement that the court is called upon to consider and interpret. An allegation made in error and admitted in error cannot be upheld by a court as being correct.

[37] I must thus find that on 31 October 2015, the Atkinsons were in occupation of one of the dwellings on the property and that they had not concluded a written agreement of lease with either the applicants or the first respondent. They remained unlawful occupants. That having been established, it is equally apparent that the first respondent had not attained sole beneficial occupation of the property by 31 October 2015. The applicant's contention therefore that the 30-day period commenced to run from 1 November 2015, and that it was completed on 30 November 2015, is incorrect and it follows that the sale agreement did not automatically fail on 30 November 2015. The conduct of the first applicant in accepting the R100 000 deposit from the first respondent on 15 December 2015 moreover is not consistent on her part with a sincere belief that the sale agreement had, indeed, failed on 30 November 2105.

[38] A final issue needs to be dealt with. This deals with the legal representation of the first respondent. On 13 September 2021 when the matter was called, I was advised that the first respondent at that stage was unrepresented. She had previously been represented but was no longer represented. She, however, informed me that she now wished to be represented by a certain Mr de Beer, who was present at court. Mr de

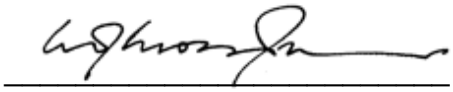
[14] *Paddock Motors (Pty) Ltd v Igesund* 1976 (3) SA 16 (A) at 23F-G.

Beer describes himself in an affidavit that he submitted during the proceedings as ‘a legal advisor and a well-known social justice activist’. It transpired that Mr de Beer was not an attorney or an advocate of this court, which was confirmed by the first respondent. Mr Schaup, who appeared for the applicants, at that stage helpfully drew my attention to the fact that a substantive application, seeking precisely the same relief, namely the representation of the first respondent by Mr De Beer, had been brought by the first respondent prior to the matter being assigned to me. That application had served before Diedricks AJ who, after hearing argument, refused the application. A week before the matter was assigned to me, Diedricks AJ had refused an application for leave to appeal his decision. When I was advised of these facts, which were admitted by the first respondent, I indicated to the first respondent that as the issue of representation had already been determined, I was bound by Diedricks AJ’s decision. I indicated that she could not be represented by Mr de Beer, but I assured her, however, that whenever she wished to seek advice from him, she would be at liberty to do so. This held true for the entire hearing and the first respondent frequently requested an opportunity to seek advice from Mr de Beer. She was allowed to do so on each and every occasion that she requested such an opportunity. The matter ultimately became part-heard for the reasons previously explained and when it recommenced on 18 January 2022, I was informed that the first respondent had sought reasons for my refusal to allow Mr de Beer to represent her. I had no knowledge of this request having been delivered. I am an acting judge and after my appointment had ended, I returned to my practice as an advocate. Prior to returning to my practice I was not advised of the request for reasons nor was I so advised once back at my practice. The court file remained at the court, and I next saw it again on 18 January 2022, the day that the resumed hearing commenced. I indicated that day that the matter should proceed and that I would provide my reasons in my final judgment. Upon reflection, I made no order but simply indicated that as the issue had already been determined by Diedricks AJ, Mr de Beer was not entitled to represent the first applicant.

[39] I accordingly determine the only issue that I was asked to determine as follows:

(a) It is declared that the sale agreement concluded between the applicants and the first respondent on 2 September 2015 did not fail by virtue of the non-fulfilment of the suspensive condition within the period prescribed by the sale agreement;

(b) The applicants are to pay the first respondent's costs jointly and severally, the one paying, the other to be absolved.



MOSSOP AJ

APPEARANCES

Counsel for the applicants	:	Mr D. Schaup Instructed by: Hay and Scott Attorneys First Floor, Alexander Forbes Wing 3 Highgate Drive Redlands Estate Pietermaritzburg
Counsel for the first respondent	:	In person
Dates of Hearing	:	13,14 September 2021; 18 January 2022
Date of Judgment	:	10 February 2022